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No. 99-____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1998

KENNETH W. FULTZ,

Petitioner,

v.

JOHN S. DUNN, JR., and DENNIS L. FARLEY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Did the court of appeals err in reversing the district court, impliedly vacating a jury verdict in favor of plaintiff, and mandating entry of judgment as a matter of law, in an action involving a motive-based constitutional tort:

(a) where the issue was whether plaintiff's activity protected by the First Amendment was a substantial or motivating factor for a seniority decision?

(b) where the jury found by express answer to interrogatory that it was?

(c) where the jury's verdict was upheld by the district court and the district court noted that defendants did not challenge the jury's finding [A24]?

(d) where the court of appeals found the evidence insufficient based on its substituted finding that defendant Dunn lacked "meaningful discretion" and that plaintiff's evidence was "vague?"

(e) where the court of appeals made subsidiary findings in apparent contradiction of the verdict?

PARTIES TO THE PROCEEDINGS

Petitioner is plaintiff Kenneth W. Fultz. In 1988, Mr. Fultz was a Park Superintendent 4 at the Tobyhanna State Park complex in Monroe County, Pennsylvania, for the Pennsylvania Department of Environmental Resources ("DER"). DER was reorganized into the Department of Conservation and Natural Resources ("the Department"), containing the Bureau of State Parks, and the Department of Environmental Protection ("DEP").

In May 1997, Mr. Fultz became the Eastern Training Coordinator, in the Bureau of State Parks, for the Department.

Respondents are defendants John S. Dunn, Jr., and Dennis L. Farley. Mr. Dunn is Chief of Employee Relations and Safety Division, Bureau of Personnel and Human Resources, for the Department. Mr. Farley is Director of the Bureau of Personnel for the Department.

Counsel for respondents is:

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Statement under Rule 29.6:

None of the parties to these proceedings is a corporation.

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TABLE OF AUTHORITIES

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U.S. Statutes:

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42 U.S.C. § 1983 3

PA Code:

4 Pa. Code § 101.71 3,14

PRELIMINARY STATEMENT

Petitioner Kenneth W. Fultz hereby petitions the court to grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered December 21, 1998 [A3-A16], remanding the cause to the United States District Court for the Middle District of Pennsylvania with instruction to enter judgment as a matter of law in favor of respondents Dunn and Farley.

OPINIONS BELOW

The opinion of the court of appeals is reported at *Fultz v. Dunn*, 165 F.3d 215 (3d Cir. 1998)[A3-A16]. An unreported opinion of the district court is included in the appendix [A17]. An unreported opinion of the court of appeals in a prior action, *Fultz v. Davis*, 941 F.2d 1201 (3d Cir. 1991) (table), is included in the appendix [A33].

JURISDICTION

This court has jurisdiction over this case under 28 U.S.C. § 1254(1), because it involves review of a judgment of the U.S. Court of Appeals for the Third Circuit.

The court of appeals had jurisdiction over the district court judgment as a final decision under 28 U.S.C. § 1291.

The district court had jurisdiction over this action pursuant to 28 U.S.C. § 1331, conferring jurisdiction over cases involving federal questions, and 28 U.S.C. § 1343 and 42 U.S.C. § 1983, conferring jurisdiction over cases involving civil rights and violations of the U.S. Constitution.

The judgment of the court of appeals was entered December 21, 1998 [A3]. The order denying petitioner's timely motion for rehearing was entered February 8, 1999

[A1].

STATUTORY PROVISIONS INVOLVED

U.S. Constitution, First Amendment:

Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Constitution, Seventh Amendment:

In Suits at common law . . . the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

28 U.S.C. § 1343(a)(3):

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person . . . to redress the deprivation, under color of any State law, statute, ordinance, regulation, custom, or usage, of any right, privilege or immunity secured by the Constitution of the United States . . . .

42 U.S.C. § 1983:

Every person who under color of any statute, ordinance, regulation, custom, or usage of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in

equity, or other proper proceeding for redress. . . .

4 Pa. Code § 101.71, Civil Service Commission Rules:

(a) Seniority as used in this part shall be continuous service unless broken by one or more of the following: resignation; retirement; failure to report after notification of appointment through mandatory, preferred or optional reemployment rights; expiration of mandatory, preferred or optional reemployment rights; or failure to report after leave and acceptance of other permanent employment while on leave of absence without pay. If service is broken for one of these reasons, the employe shall lose accrued seniority.

(b) Periods of furlough and approved leave of absence without pay shall be deemed continuous employment for seniority purposes, except that the period of furlough or leave of absence without pay will not be counted toward seniority.

(c) Removal for cause shall terminate accrued seniority. Demotion for cause shall terminate seniority in the class from which demoted.

STATEMENT OF THE CASE

Nature of Action

This a is First Amendment action, brought by a state park manager under 42 U.S.C. § 1983, and *Mt. Healthy City School Dist. Bd of Ed. v. Doyle*, 429 U.S. 274 (1977), against state personnel officers, for a retaliatory job action.

Petitioner Kenneth W. Fultz claims misrepresentation of his seniority, leading to denial of his promotion to Park Operations Manager I at either French Creek or Gifford Pinchot State Park. Mr. Fultz won a jury verdict, and was awarded compensatory and punitive damages, correction of his seniority, and the promotion.

Mr. Fultz alleged that his commencing, maintaining and prevailing in a 1990 lawsuit against former officials of the Department was a substantial and motivating factor in respondent John S. Dunn's 1992 decision not to credit Mr. Fultz for service before his termination in 1988.

Mr. Fultz alleged that Dennis L. Farley, Mr. Dunn's immediate supervisor, acquiesced in Mr. Dunn's conduct.

Statement of Facts

Mr. Fultz was terminated by the Department in 1988, in his 25th year of service, for three alleged transgressions, the principal one being his practice of personally collecting $25 each from boat owner at Tobyhanna State Park, in exchange for moving their boats on his own time to his home for the winter [A35-A39]. The park administration viewed this as a violation of park regulations and of the lease on his park home from the Commonwealth, as landlord.

Mr. Fultz challenged his termination in five fora between 1988 and 1991. He failed to upset the termination decision in his first four attempts, although the Commonwealth Court of Pennsylvania (his second forum) dismissed two minor alleged transgressions [A38]. On July 15, 1991, Mr. Fultz prevailed in the Third Circuit Court of Appeals (his fifth forum), which ordered his reinstatement and cleared the way for a trial on damages [A45]; *Fultz v. Davis*, 941 F.2d 1201 (3d Cir. 1991)(table). The court of appeals, however, allowed the Department to start new termination proceedings consistent with Due Process [A45].

Mr. Fultz and the Department settled the *Davis* action on May 29, 1992, before trial, with the Department agreeing to reemploy Mr. Fultz and to drop the original charges, with Mr. Fultz to receive some of the compensation he sought for his procedurally defective termination [A6].

Although Mr. Dunn was a central personnel officer and had no significant contact with Mr. Fultz before the 1988 termination, Mr. Dunn became Mr. Fultz's chief nemesis in and after 1988.

Mr. Dunn ran the 1988 termination process, and his termination process caused the court of appeals to order reinstatement and to authorize a trial against his superiors individually for money damages.

In June 1992, Mr. Dunn secretly falsified, or caused another to falsify, Mr. Fultz's personnel record on the Commonwealth computer system. Mr. Dunn and his assistants had access, but Mr. Fultz did not. Mr. Dunn wiped out over 24-years of service, by falsely entering Mr. Fultz's 1988 termination as a "voluntary resignation."

In November 1992, Mr. Fultz bid for promotion to French Creek and Gifford Pinchot State Parks. A personnel analyst accessed the Commonwealth computer system, saw the break-in-service, as falsified by Mr. Dunn, and was misled to the conclusion that Mr. Fultz had five months seniority--just as Mr. Dunn had intended.

Had Mr. Fultz's been given credit for his 24+ years of service before 1988, there would have been only three candidates for consideration for promotion to Park Manager I at Gifford Pinchot State Park in addition to Mr. Fultz. Those three candidates became eligible by civil service exam, but had modest experience in park management.

Because the personnel analyst erroneously concluded that Mr. Fultz had only five months seniority, the candidate list was expanded to eight, so that Mr. Fultz had seven, rather than three competitors for the position, including the two managers who received the positions, both of whom were experienced park managers.

Neither candidate selected would have been on the candidate list for Gifford Pinchot if Mr. Fultz had been credited with his full seniority.

In April 1993, Mr. Farley, Mr. Dunn's immediate superior, acquiesced in Mr. Dunn's conduct.

Procedural History

On November 22, 1994, Mr. Fultz filed his complaint against the Department, Mr. Dunn and Mr. Farley. On May 15, 1995, plaintiff served his amended complaint, dropping the Department as previously ordered by the court.

On August 17, 1995, respondents moved for summary judgment.

On January 16, 1996, the court denied the summary judgment motion in material part.

From August 6 - 9, 1996, this action was tried to a jury. In addition to the testimony of the plaintiff and two defendants, the jury heard five witnesses, and received fourteen exhibits.

At the close of plaintiff's case-in-chief and again at the close of the evidence, respondents moved for judgment as a matter of law, pursuant to Rule 50, F.R.Civ.P., which motions the court denied.

In his closing to the jury, plaintiff's counsel summarized Mr. Fultz's showing: Mr. Dunn was deeply involved in Mr. Fultz's termination, the *Davis* litigation and his reinstatement. He had rejected the decisions of the Third Circuit and his superiors to reinstate Mr. Fultz. He did not seek counsel from the legal department or anyone else in making the seniority decision. He caused an entry to be made on the Commonwealth computer system to show that Mr. Fultz had voluntarily resigned so that anyone looking at the screen would think that Mr. Fultz had resigned and had not been unconstitutionally terminated and reinstated after a court order. [Voluntary resignation and failure to return within one year resulted in loss of accrued seniority.] Mr. Dunn did not tell Mr. Fultz in 1992 what he had done and he did not consult with Mr. Fultz's lawyer. He again deprived Mr. Fultz of a hearing in making a critical decision. Mr. Dunn was inconsistent in his explanations, at various times relying on the Civil Service Rule, the settlement agreement, and his purported belief that Mr. Fultz had refused to pay

back money to the retirement system upon his return to work. The settlement agreement supported Mr. Fultz. While the settlement agreement did not mention seniority specifically, it also did not specify Mr. Fultz would get a desk, a chair, and a telephone. Seniority was a fact. He had worked. He had been wrongly terminated. Other provisions of the agreement were consistent with seniority. He got pay appropriate for somebody with 21 years of service, 135 accrued sick days, and 40 days of leave or vacation time. The settlement was supposed to be a peace agreement. Mr. Dunn could have put a true explanation on the computer system, such as wrongfully terminated, reinstated by court order. He could have used a footnote or longer explanation if necessary.

In her closing, counsel for respondents summarized the evidence as follows: the Third Circuit decision in *Davis* had nothing to do with the seniority decision because the parties reached an agreement; the agreement could have provided for seniority at the insistence of Mr. Fultz, but it did not; Mr. Dunn had to put a symbol in the computer system that would not reflect that Mr. Fultz had been terminated in order to carry out the settlement; Mr. Fultz retired and lost seniority under the Civil Service Rule; Mr. Wilk, executive director of the Civil Service Commission, did not say Mr. Dunn did anything wrong; Mr. Dunn had done it right; when you're gone for more than a year, you lose seniority; Mr. Dunn was not biased against Mr. Fultz and had no animosity toward him; Mr. Dunn had responsibility for over 4,000 employees; there was nothing special about the termination of Mr Fultz; Mr. Dunn was not reprimanded over the loss of the *Davis* action.

Mr. Fultz's counsel argued in rebuttal that the decision in *Davis* was so special because it held that the procedure used

by the Department violated the due process rights of employees under the Constitution and applied to the 4,000 employees for whom Mr. Dunn had responsibility; that Mr. Dunn applied a Civil Service Rule mechanically to hurt Mr. Fultz; that the rule does not govern a particular situation; and, that Mr. Dunn tried to apply the rule in a situation in which it did not apply.

The district court charged the jury and said as to seniority:

> "Second, the plaintiff must show by a preponderance of the evidence that the exercise of his First Amendment right was a substantial or motivating factor in the defendants' calculation of his seniority upon his return to work at the department. Mr. Fultz need not, however, show that his prior protected activity was the sole reason that defendants calculated his seniority the way that they did.
>
> "Now in considering whether plaintiff has proved his claims you must also consider the defense available to the defendants. The defense consists of the following: Even if you find that Mr. Fultz has shown that his prior lawsuit was a motivating factor in defendants calculation of his seniority, you must find for the defendants if they have demonstrated by a preponderance of the evidence that the same action would have been taken even in the absence of the protected activity."

The jury was given six special verdict questions and then retired to deliberate [A29-A32].

Question 1, part 2, which was included upon request of

respondents, said [A30]:

> "Do you find that even though Plaintiff's exercise of his First Amendment Activity was a substantial or motivating factor in Defendant Dunn's calculation of his seniority, that the same action would have been taken in the absence of the protected activity?"

On August 9, 1996, the jury answered special verdict questions in favor of Mr. Fultz and against each respondent, and awarded compensatory and punitive damages [A29-A33]. The jury answered question 1, part 2 above, "No."

Compensatory damages comprised awards of $15,000 for past loss of earnings, $15,000 for future loss of earnings, $120,000 for past and future loss of retirement benefits, $15,000 for reimbursement of certain expenses, and $10,000 for embarrassment, humiliation and emotional harm [A31]. Mr. Fultz was awarded nominal damages of $1 on his loss of seniority.

Punitive damages were assessed against each respondent in the amount of $20,000 [A32]. The total amount of the verdict was $215,001.

On September 24, 1996, the district court granted Mr. Fultz's motion for equitable relief, including promoting him and directing respondents to credit him with seniority accrued from October 1967, to date, including the period from April 20, 1988, through June 15, 1992, and to promote him immediately [A17-A18].

On September 26, 1996, judgment was entered on the verdict.

On October 8, 1996, Mr. Fultz filed three post-judgment motions, including to reconsider and amend part of the September 24, 1996, order on equitable relief [A17].

On October 10, 1996, respondents filed their second renewed motion for judgment as a matter of law, pursuant Rule 50(b), F.R.Civ.P., and motion, in the alternative, for a new trial, pursuant to Rule 59(b).

On January 16, 1997, the district court granted plaintiff's motion to reconsider and amend the September 24 order as to equitable relief, and denied respondents' post-trial motions [A17]. The court noted, at n.2, that defendants did not challenge the jury's finding that plaintiff's prior protected activity was a substantial or motivating factor in defendant Dunn's calculation of plaintiff's seniority [A24].

On May 28, 1997, the parties reached an agreement to assign plaintiff to the position of Eastern Training Coordinator, a lateral transfer rather than a promotion to restore the lost future earnings award.

On June 18, 1997, the district court denied respondents' second set of post-trial motions.

On August 7, 1997, respondents filed their notice of appeal, and on September 19, 1997, plaintiff filed his notice of appeal from orders waiving the requirement to post a bond and deferring decision on an award of attorneys fees. On July 23, 1998, the two appeals were consolidated.

On December 21, 1998, the court of appeals issued its decision and judgment [A3].

On January 19, 1999, Mr. Fultz filed his timely petition

for rehearing.

On February 8, 1999, the court of appeals denied the petition for rehearing [A1].

REASONS FOR GRANTING THE WRIT

This appeal raises the respective roles of the court and jury in actions involving motive-based constitutional torts. This court should review the question presented by petitioner because the U.S. Court of Appeals for the Third Circuit has entered a decision that is in conflict with decisions of this court involving retaliatory job actions in violation of the First Amendment: *Crawford-El v. Britton*, 523 U.S. 574, 118 S.Ct. 1584 (1998), and *Mt. Healthy City School Dist. Bd of Ed. v. Doyle*, 429 U.S. 274 (1977).

The court of appeals decision is also in conflict with a decision of this court in the analogous area of employment discrimination, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

The court of appeals misapprehended its role in this motive-based Constitutional tort case, and substituted its judgment of the facts for that of the jury, contrary to *Crawford-El*, *Mt. Healthy* and *Price Waterhouse*. It did so even though the district court had found that defendant Dunn had not challenged the jury's finding that Mr. Fultz's prior protected activity was a substantial or motivating factor in defendant Dunn's calculation of seniority [A24].

The court of appeals, relying on dictum in *Larsen v. Senate*, 154 F.3d 82, 95 (3d Cir. 1998), proceeded in a manner not authorized by *Mt. Healthy*. The *Larsen* dictum, as quoted by the court of appeals [A12], said:

> "In some circumstances, the legitimate basis for the actions might be so apparent that the plaintiff's allegations of retaliatory motive could not alter the conclusion that under the circumstances ... the defendants would have been compelled to reach the same decision even without regard for the protected first amendment activity."

No authority was cited in *Larsen* or by the court of appeals here (other than *Larsen*) to support this proposition. The court of appeals concluded [A12-A13]: "Thus, the protected activity was not a substantial or motivating factor in Dunn's conduct with respect to Fultz's seniority...."

This statement contrasts with *Davis v. Scherer*, 468 U.S. 183, 195 n.14 (1984), that "officials must make discretionary determinations even in the course of applying facially clear provisions," cited in *Larsen*, n.5.

The first step under *Mt. Healthy* is to determine whether the protected conduct was a substantial or motivating factor in the decision.

A plaintiff's showing of improper intent is "a pure issue of fact." *Crawford-El*, 118 S.Ct. at 1592.

Instead of following *Mt. Healthy*, the court of appeals began by analyzing the legitimacy of respondents' action under the Civil Service rule. To defeat a First Amendment retaliation claim, if a plaintiff demonstrates that his protected First Amendment activity was a substantial or motivating factor for the retaliatory action, a defendant must establish not merely that he "could properly" have taken the same adverse action based on an independent "legally sufficient" reason, but also that he "would have" done so, in the absence

of protected conduct. *Mt. Healthy*.

The court of appeals found that Mr. Fultz did not show that Mr. Dunn had "meaningful discretion" to act other than as he did in determining that Mr. Fultz did "did not recapture his seniority upon his reemployment" [A10], and thus Mr. Fultz's evidence as to retaliatory conduct was insufficient to support the verdict. The court of appeals said that it rested its conclusion on its reading of the Pennsylvania Civil Service Rule [A11-A13], 4 Pa. Code § 101.71.

The Civil Service rule is clear as to certain kinds of returning employees, but unclear as to others: employees who return from a furlough or approved leaves of absence keep accrued seniority, but do not accrue any while on furlough or leave; employees removed for cause lose accrued seniority; employees who resign, retire, or fail to report when recalled, keep accrued seniority, provided they return within one year, but lose it when they do not return within one year. The rule is at best ambiguous as to other returning employees, and provides little guidance for the exceptional case of Mr. Fultz.

The rule is not clarified by any judicial or administrative gloss, and respondents presented no information as to its history or purpose.

Mr. Dunn admitted that he could have determined that Mr. Fultz would retain his accrued seniority by classifying him as having been on a leave of absence [A14]. The rule seems to favor employees who do not intend to leave service, and this certainly applies to Mr. Fultz.

Price Waterhouse, 490 U.S. at 252, held that in a mixed motive case, an employer may not prevail by offering a

legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision. The finding by the court of appeals that Mr. Dunn was compelled to act as he did because the civil service rule was clear has a similar ex post facto character.

The court of appeals set forth several additional matters, which were proper subjects of jury inference. Mr. Fultz testified that he believed that "reemployed" and "reinstated" were used interchangeably, and that by the settlement agreement, he believed he would get back whatever he had lost. The court of appeals inferred that Mr. Fultz may have accepted reemployment as of June, 1992, rather than reinstatement retroactively as of 1988 [A10-A11]. The court of appeals inferred [A15-A16] that Mr. Fultz "apparently recognized that there was a seniority question when the 1990 case was settled." This inference is in chain with others suggesting that Mr. Fultz is attempting to enhance his settlement [A15-A16].

The court of appeals implied that Mr. Fultz was in a weak bargaining position in 1992 because the Department could refile charges and dismiss him once again--all in support of the inference that he bargained away reinstatement. But, the court of appeals overlooked that Mr. Fultz had open-ended damages claims ready for trial in *Davis*, where he had already prevailed on liability in the court of appeals. The jury may have inferred that defendants were in a weaker position than Mr. Fultz.

Respondents conceded that the parties could have agreed on seniority, thereby prevailing over the rule, and the court of appeals said the same thing [A16]. The jury could have concluded that the parties impliedly so agreed, based on Mr. Fultz's uncontradicted testimony that he thought he got back

what he lost, and on compatible express terms, such as salary consistent with 21+ years seniority, accrued sick days, and accrued vacation days.

The jury may also have drawn inferences from the express agreement to drop and forget the old charge and to purge the file. The court of appeals drew an inference unfavorable to Mr. Fultz from his acknowledgement of past error [A6, A9], but the jury may have drawn the opposite inference, that the settlement agreement was a peace agreement, and that the Department did not intend that Mr. Fultz lose accrued seniority.

The court of appeals [A13] was deferential to Mr. Dunn's selection of "voluntary resignation" as a "literally 'false'" entry in the Commonwealth computer system. Mr. Fultz had argued that this was done so that anyone in personnel looking at the computer would conclude that Mr. Fultz lost accrued seniority. Mr. Dunn argued that he acted to benefit Mr. Fultz and to comply with the settlement agreement. But, the settlement agreement merely provided that the Department would purge the file with respect to matters investigated or charged in 1988. These were among the most disputed facts, and presumably the jury was not so understanding of Mr. Dunn's actions, as reflected in its award of punitive damages against him. The jury may have concluded that, had a correct entry been made, personnel employees would have sought clarification, giving Mr. Fultz an opportunity to urge more favorable treatment.

The jury may have inferred that the settlement agreement settled the issues left open by the court of appeals on July 15, 1991, but that the court of appeal's order of reinstatement was incorporated into the settlement agreement. The court of appeals inferred [A10-A11] that Mr. Fultz may

have bargained away "reinstatement" for something less, under the coinage "reemployment" (contrary to Mr. Fultz's testimony).

If the jury inferred that "reinstatement" survived the settlement agreement, reinstatement would prevail over a state civil service rule, no matter how clear. *Squires v. Bonser*, 54 F.3d 168, 176 n.14 (3d Cir. 1995).

The jury was justified in drawing inferences in favor of Mr. Fultz in light of evidence missing from respondents' presentation. Respondents did not call James Grace, the deputy secretary who negotiated the May 1992 settlement agreement, or John Wilk, the executive director of the Civil Service Commission. Respondents did not provide specific information about other terminated employees, who successfully challenged their terminations, to justify the manner in which Mr. Fultz was treated.

Conclusion

Petitioner Kenneth W. Fultz asks the court to grant his petition for a writ of certiorari and to review the December 21, 1998, decision of the Court of Appeals.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 97-7378 & 97-7503

KENNETH W. FULTZ

v.

JOHN S. DUNN, JR.; DENNIS L. FARLEY;
DEPARTMENT OF ENVIRONMENTAL RESOURCES,
COMMONWEALTH OF PENNSYLVANIA;
JAMES M. SEIF; JOHN S. DUNN, JR.;
DENNIS L. FARLEY

Appellants in No. 97-7378

KENNETH W. FULTZ,

Appellant in No. 97-7503

v.

JOHN S. DUNN, JR.; DENNIS L. FARLEY;
DEPARTMENT OF ENVIRONMENTAL RESOURCES,
COMMONWEALTH OF PENNSYLVANIA;
JAMES M. SEIF

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civ. No. 94-01914)

SUR PETITION FOR REHEARING

BEFORE: BECKER, Chief Judge, and SLOVITER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, NYGAARD, ALITO, ROTH, LEWIS, MCKEE, RENDELL, and GODBOLD, Circuit Judges

The petition for rehearing filed by the appellee-appellant, Kenneth W. Fultz, in the above captioned matters having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the court in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied. The vote of Judge Godbold is limited to denying rehearing before the original panel only.

*Honorable John C. Godbold, Senior Judge of the United States Circuit Court of Appeals for the Eleventh Circuit, sitting by designation.

BY THE COURT,

/s/

Circuit Judge

Dated: **FEB - 8 1999**

Kenneth W. FULTZ

v.

John S. DUNN, Jr.; Dennis L. Farley; Department of Environmental Resources, Commonwealth of Pennsylvania; James M. Seif,

Appellants in No. 97-7378.

Kenneth W. Fultz,
Appellant in No. 97-7503

v.

John S. Dunn, Jr., et al.,

United States Court of Appeals,
Third Circuit.
Argued Nov. 19, 1998.
Decided Dec. 21, 1998.

D. Michael Fisher, Attorney General, John G. Knorr, III (argued), Chief Deputy Attorney General, . . . for John S. Dunn and Dennis L. Farley.

Cletus P. Lyman (argued), Michael S. Fettner, Lyman & Ash, Philadelphia, PA, for Kenneth W. Fultz.

BEFORE: GREENBERG, ALITO, and GODBOLD, [FN*] Circuit Judges.

FN* Honorable John C. Godbold, Senior Judge of the United States Court of Appeals for the Eleventh Circuit, sitting by designation.

OPINION OF THE COURT

GREENBERG, Circuit Judge.

I. INTRODUCTION

Appellants John S. Dunn, Jr. and Dennis Farley, officers of the Pennsylvania Department of Conservation and Natural Resources, appeal from a final judgment entered on a jury verdict against them in favor of appellee Kenneth W. Fultz, a Department employee. Fultz asserted a First Amendment retaliation claim in this action under 42 U.S.C. s 1983, the alleged retaliation being in response to his conduct in having brought an action entitled Fultz v. Davis, D.C. Civ. No. 90-00779 ("Davis"), in the United States District Court for the Middle District of Pennsylvania. In Davis, Fultz successfully challenged his dismissal in 1988 by the Department of Environmental Resources, the predecessor to the Department of Conservation and Natural Resources. As a matter of convenience, we refer to both Departments interchangeably as Department. In particular, in this case Fultz charged that upon his reemployment, as a result of Davis, Dunn, the Department's Chief of Employee Relations and Training, deprived him of his seniority, thus causing him to lose a later promotion to a position as Park Operations Manager I. Fultz asserted that Dunn took this action on behalf of himself and Farley, the Director of the Department's Bureau of Personnel, and thus we do not differentiate between the appellants in this opinion. The appellants denied that Dunn acted to retaliate against Fultz, and at and after the trial unsuccessfully sought a judgment as a matter of law pursuant to Fed.R.Civ.P. 50(b).

On this appeal the appellants assert that they are entitled to a judgment as a matter of law, or, alternatively, to a new

trial pursuant to Fed.R.Civ.P. 59. Inasmuch as Dunn reemployed Fultz in accordance with a civil service rule which afforded him no discretion to make a decision that would have preserved Fultz's seniority, we hold that, as a matter of law, Dunn, and thus Farley, did not retaliate against Fultz. Consequently, we will reverse the judgment of the district court as well as all orders and judgments granting Fultz monetary damages or equitable relief and will remand the case to the district court to vacate all such orders and judgments. Moreover, the district court on the remand should enter a judgment as a matter of law in favor of Dunn and Farley. Our disposition of the appeal makes it unnecessary for us to consider the appellants' request for a new trial.

Fultz appeals from orders which stayed execution on the judgment without requiring the appellants to post a supersedeas bond, and which deferred an award of attorney's fees pending disposition of the appellants' appeal. We have consolidated the two appeals. In view of our disposition of the appellants' appeal, we will dismiss Fultz's appeal, which clearly is moot as he no longer has a judgment in his favor and cannot recover attorney's fees under 42 U.S.C. § 1988, as he is not a prevailing party. See U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18, 21, 115 S.Ct. 386, 389, 130 L.Ed.2d 233 (1994).

II. BACKGROUND

A. Factual History

In 1988, the Department fired Fultz from his position as a state park manager after 24 years of employment, in part for running a boat storage business without the Department's knowledge. In various fora, Fultz argued that the

Department fired him without procedural due process and, in 1990, he filed the Davis action in the district court against the Department and two of its officials, other than Dunn or Farley, challenging his termination. In Davis, the district court granted the defendants summary judgment, but on appeal on July 15, 1991, we reversed, as we held that Fultz had not received the pre-termination hearing required by Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). Thus, we ordered the defendants to reinstate Fultz to his position. We further provided that the district court could consider additional relief on remand. Significantly, however, we permitted the Department to refile charges against Fultz on the basis of a constitutionally adequate hearing. See Fultz v. Davis, Nos. 90- 6039 and 91-5058, slip op. at 14 (3d Cir. July 15, 1991). Thus, our opinion was a procedural victory for Fultz but in no way exonerated him from the Department's misconduct allegations against him.

On May 29, 1992, Fultz and the Department reached a settlement agreement before trial on the remand in Davis. The agreement stated that Fultz acknowledged his error in engaging in the boat storage business and that he regretted his activity. On the other hand, the Department agreed not to re-file charges against him and, as particularly germane here, the Department agreed to "re-employ Fultz in the capacity of Park Superintendent IV with re- employment to commence June 15, 1992," "to provide [Fultz] with 40 days annual leave and 135 days of sick leave," and to pay $75,000 to Fultz "in settlement of his claims." The agreement further provided that the defendants would "purge [Fultz's personnel] file with respect to matters investigated or charged in 1988." Significantly, the agreement did not mention seniority.

Dunn, who was not a party in Davis, was responsible for

implementing the settlement agreement. The Department reemployed Fultz in the Bureau of State Parks in Harrisburg at an appropriate rank and pay level. To comply with the settlement agreement provision requiring the purging of Fultz's personnel file, Dunn deleted the word "terminated" from Fultz's computer personnel record and substituted the benign term "voluntary resignation" to describe the break in Fultz's work history from 1988-1992. It is undisputed that upon his reemployment the Department did not credit him with seniority for his employment prior to his 1988 termination, or for 1988-1992. In effect, the Department treated Fultz as a newly hired employee with seniority accruing from the date it rehired him in 1992.

In November 1992, Fultz applied for a promotion to either of two Department positions at higher levels in rank and with higher salaries than his position at that time. When the Department awarded the positions to other applicants, Fultz learned that he had not recaptured his seniority upon his reemployment, and had been viewed as an employee with five months rather than 24 years of seniority. Fultz attributes his failure to obtain a position as Park Manager I to his loss of seniority for his service prior to his 1988 termination.

B. Procedural History

On November 22, 1994, Fultz filed this suit against the appellants, advancing two arguments: (1) Dunn had miscalculated his seniority to retaliate against him for having successfully brought the 1990 Davis action, and (2) he otherwise would have received one of the promotions. We focus on the first argument because our disposition of it is determinative of this appeal. The court submitted the case to the jury on written interrogatories. The first question was

"Do you find that [Fultz's] exercise of his First Amendment rights was a substantial or motivating factor in Defendant Dunn's calculation of his seniority?" The court told the jury that if it answered that question "No" it was to return to the courtroom, thus recognizing that unless Fultz was successful on that question he would lose the case. On this appeal, Fultz does not contend that the court was wrong on this point.

The jury, however, answered "Yes" and went on to answer the remaining interrogatories in Fultz's favor and to award him substantial damages. In addition, the court granted Fultz equitable relief which, in view of our disposition, we need not describe at length. On January 16, 1997, the district court denied the appellants' motions for a judgment as a matter of law or for a new trial, finding the motions untimely filed, but stating that there was sufficient evidence in the record to support the jury's verdict. In a subsequent opinion, however, the court acknowledged that the posttrial motion leading to the January 16, 1997 order was timely and Fultz does not contend that the appellants have not preserved the right to contend on this appeal that they were entitled to a judgment as a matter of law.

III. DISCUSSION

Our standard of review on this appeal is well established. We exercise plenary review and will overturn a jury verdict "only if, viewing the evidence in the light most favorable to the nonmovant and giving it the advantage of every fair and reasonable inference, there is insufficient evidence from which a jury reasonably could find liability." Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1166 (3d Cir. 1993).

Because Fultz alleges that his conduct in having brought the Davis case led the appellants to retaliate against him by wrongly calculating his seniority, the case is governed by the three-prong analysis enunciated by the Supreme Court in Mount Healthy City Sch. Dist. Bd. of Ed. v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). A public employee alleging an adverse employment action because he engaged in protected First Amendment activity must show that (1) he engaged in protected activity, and (2) the protected activity was a substantial or motivating factor for the adverse action. See Swineford v. Snyder County, 15 F.3d 1258, 1270 (3d Cir.1994) (applying Mt. Healthy test). If the plaintiff satisfies the first two prongs, the defendant can escape liability by showing that (3) he would have taken the same action absent the protected activity. See Pro v. Donatucci, 81 F.3d 1283, 1287-88 (3d Cir.1996).

Fultz argues that the protected activity was the successful 1990 Davis suit, and that the adverse action was the miscalculation of seniority. [FN1] While the appellants acknowledge that Fultz's Davis action was protected First Amendment activity, they counter that no reasonable jury could have found that Dunn calculated Fultz's seniority to retaliate against him for having brought that case, because civil service rules governed Dunn's calculation, and because Fultz did not bargain for recapture of his seniority in the settlement agreement. [FN2] Thus, the appellants contend that Fultz did not show that the protected activity was a substantial or motivating factor in Dunn's conduct, and that in any case, they demonstrated that the seniority determination would have been the same absent Fultz's protected activity. [FN3]

FN1. The jury was instructed that the calculation of seniority, and not the Department's denying Fultz a

promotion, was the adverse action. Fultz argued at trial and in his briefs that the loss of promotion stemmed from the calculation of seniority, but in view of our result we need not describe at length the basis for that argument.

FN2. It is not clear that Dunn actually made a notation that Fultz did not have seniority for his employment prior to his 1988 termination. The seniority had been eliminated under the applicable civil service rule prior to 1992 and it simply was not restored at that time. Nevertheless, we sometimes will refer to Dunn as having determined Fultz's seniority.

FN3. Of course, it is difficult to understand how the third Mt. Healthy v. Doyle prong could be implicated in this case, for, if Fultz had not engaged in the protected activity by filing the Davis case, there is no reason to believe that the Department would have reemployed him and thus have had a reason to make decisions affecting his seniority.

Inasmuch as appellants acknowledge that Fultz's Davis suit was protected First Amendment activity, the issue on this appeal is whether that activity was a substantial or motivating factor in Dunn's calculation of seniority. The district court in a post-trial opinion denying appellants a judgment as a matter of law determined that "the record contains sufficient evidence from which the jury could conclude that the decision as to how to calculate [Fultz'] seniority was within ... Dunn's discretion." We disagree. Fultz did not show that Dunn had meaningful discretion to act other than he did in determining that Fultz did not recapture his seniority upon his reemployment. Moreover, Fultz did not bargain for recognition of seniority based on his terminated employment in the settlement agreement. Rather, he agreed to be reemployed commencing June 15, 1992. Of course, he had good reason to accept reemployment as of that date rather

than to insist on being reinstated retroactively as of 1988 when he was terminated. After all, he acknowledged his error in engaging in the boat storage business, but the Department nevertheless agreed not to refile the charges against him which our opinion in Davis permitted it to do. We also point out that the parties cannot repeat the original settlement negotiations, so we have no way of knowing whether he could have negotiated successfully to recapture his seniority.

Fultz's seniority was governed by 4 Pa. Code § 101.71 [FN4] which provides as follows:

FN4. The briefs submitted by both sides in this case treated this regulation as the one that governed this case. However, near the end of the oral argument, counsel for Fultz suggested for the first time that this regulation was not in effect at the relevant time. Based on his brief, we refuse to entertain that argument.

(a) Seniority as used in this part shall be continuous service unless broken by one or more of the following: resignation; retirement; failure to report after notification of appointment through mandatory, preferred or optional reemployment rights; expiration of mandatory, preferred or optional reemployment rights; or failure to report after leave and acceptance of other permanent employment while on leave of absence without pay. If service is broken for one of these reasons, the employe[e] shall lose accrued seniority. If an employe[e] is returned within 1 year after this type of break in service, the employe[e] is entitled to credit for seniority purposes the time accrued up to the time the break in service occurred, but is not entitled to credit for the time represented by the break in service.

(b) Periods of furlough and approved leave of absence without pay shall be deemed continuous employment for seniority purposes, except that the period of furlough or leave of absence without pay will not be counted toward seniority.

(c) Removal for cause shall terminate accrued seniority. Demotion for cause shall terminate seniority in the class from which demoted.

Under this rule, Fultz did not have seniority when the Department reemployed him based on his service prior to his 1988 removal because his service was not "continuous." While the rule provides for recapture of seniority if service is broken for one of the enumerated reasons, this recapture is possible only if the "employe[e] is returned within 1 year after this type of break in service." Here, of course, the break in service far exceeded one year. Thus, even if Dunn had treated Fultz's termination as a "resignation" or a "retirement" Fultz could not have overcome the one-year obstacle so as to obtain seniority for his service prior to his reemployment. Therefore, we have a situation which, as we recently noted in Larsen v. Senate of the Commonwealth of Pennsylvania, 154 F.3d 82, 95 (3d Cir. 1998), could arise in a First Amendment retaliation case:

> In some circumstances, the legitimate basis for the actions might be so apparent that the plaintiff's allegations of retaliatory motive could not alter the conclusion that under the circumstances ... the defendants would have been compelled to reach the same decision even without regard for the protected First Amendment activity.

Thus, the protected activity was not a substantial or

motivating factor in Dunn's conduct with respect to Fultz's seniority and the appellants are entitled to a judgment as a matter of law.

In reaching our result, we reiterate that we recognize that when the Department reemployed Fultz, Dunn removed the word "terminated" from his personnel record in the Department's computer system, as directed by the settlement agreement, and entered "voluntary resignation." Fultz characterizes the change as "falsely" entered and retaliatory. Dunn's action was literally "false" in that Fultz did not voluntarily resign in 1988 but had been terminated improperly. Yet the evidence showed that inasmuch as Dunn was directed by the settlement agreement to delete "terminated," another term had to be entered, and none of the available terms characterized what had occurred more accurately.

In any event, Fultz could not rebut Dunn's testimony that the result--loss of seniority--would have been the same regardless of what term he used. Dunn testified that he selected the term "voluntary resignation" from a set of terms or "transaction codes" used at that time by the Department to describe various changes in employment status, such as transfers or leaves. While he had discretion in labeling the four-year break in service as a "voluntary resignation," versus such other plausible, available terms as "involuntary resignation" or even "retirement," he testified that his choice of label was in any case immaterial because, whatever the label--"voluntary resignation" or "involuntary resignation" or "wrongly terminated and now reinstated"--under the civil service rules Fultz would have lost his seniority.

As we have indicated, our reading of the civil service rules convinces us that Dunn was correct. The applicable civil

service rule states that seniority is lost whenever there is a break in an employee's service of more than one year, 4 Pa. Code § 101.71(a), whether the break is due to "retirement," "termination" or "resignation," and other circumstances. Id. The only express exceptions are for employees who are furloughed or on "leave without pay," terms which certainly did not describe the circumstances here. Id., at (a), (b). [FN5] Thus, in his brief Fultz completely misstates what happened when the Department reemployed him in 1992, as he indicates that "Mr. Dunn wiped out over 24-years of service, by falsely entering Mr. Fultz's 1988 termination as a 'voluntary resignation.' " Br. at 11. In fact, it was the circumstance that Fultz's service was not continuous as required by the applicable civil service rule which "wiped out" his seniority.

FN5. Dunn testified that he did not use the term "leave without pay" to characterize the four-year break because he understood that Fultz had withdrawn funds from the state retirement fund between 1988 and 1992 and could not or did not wish to repay them.

We find it highly significant that if Dunn had circumvented the Department's transaction codes and more accurately indicated that Fultz had been "wrongfully terminated and was now reemployed" Fultz nevertheless would not have recaptured the pre-1988 service for seniority purposes, because his service would not have been continuous and the break in service still would not have been attributable to a circumstance under the civil service rules allowing seniority recapture. It is thus clear that Fultz reasonably cannot charge that Dunn wrongfully deprived him of seniority.

Moreover, if Dunn attempted to invent a term to recapture Fultz's seniority for his service prior to the 1988 termination,

he would have been giving Fultz more than he bargained for when he came to an agreement with the Department settling the Davis action. The settlement agreement did not mention seniority, so when Fultz was returned to work, Dunn had no directive to give Fultz more than he had bargained for or to which he was entitled as, in effect, a new employee. [FN6] The plain fact is that Fultz is misusing this First Amendment retaliation case as a vehicle to enhance his settlement.

FN6. The district court's order of September 24, 1996, to remedy Fultz's failure to receive a promotion directed the appellants to enter into Fultz's personnel record the term, "[w]rongful termination and reemployment with no break in service," a term that did not exist as a transaction code option at the time Dunn made the entry (and does not exist today) and which would have had to have been invented by him for the express purpose of preserving seniority. This order was an unjustified amendment of the settlement agreement to give Fultz seniority to which he was not entitled.

The only evidence Fultz presented to show that Dunn retaliated against him by "incorrectly" reinstating him without accrued seniority was his own belief that under the settlement agreement he would be reinstated with accrued seniority, and his conversation with John Wilk, Executive Director of the Civil Service Commission, when he did not receive a promotion. Fultz asserts that Wilk had told him that "the department had the right to interpret [the seniority rule] however they wanted." But that vague evidence cannot be permitted to overcome the unambiguous rule provisions so as to permit a conclusion that Dunn could have circumvented the rule. The rule is clear and leaves no room for "interpretation." Moreover, there was no evidence to show that Fultz had been promised the opportunity to return to

work with his seniority preserved. Finally, we point out that inasmuch as Fultz apparently recognized that there was a seniority question when the 1990 case was settled, he should have clarified that point at that time. If he had done so, this case could have been avoided.

In sum, it is perfectly clear that Fultz has not shown that Dunn would have--or could have--done other than view the four-year interruption as a break in service leading to the elimination of accrued seniority, given that Fultz did not bargain for anything else. We find that Fultz failed to provide sufficient evidence to show that his protected activity was a substantial or motivating factor for the seniority decision. Thus, Fultz's evidence as to retaliatory conduct was insufficient to support the verdict and the appellants are entitled to a judgment as a matter of law.

IV. CONCLUSION

For the foregoing reasons, in the appellants' appeal, No. 97-7378, we will reverse the judgment and orders in favor of Fultz granting him damages and equitable relief, and will remand the case to the district court to enter a judgment as a matter of law in favor of appellants Dunn and Farley. We will dismiss Fultz's appeal in No. 97-7503 as moot.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

KENNETH W. FULTZ,	:	CIVIL ACTION
	:	NO. 1:94-CV-1914
v.	:	
	:	FILED
JOHN S. DUNN, JR.,	:	HARRISBURG, PA
DENNIS L. FARLEY, and	:	
JAMES M. SEIF,	:	
	:	JAN 16 1997
Defendants	:	

MEMORANDUM

Before the court are Plaintiff's motion to reconsider and amend the court's September 24, 1996 order, in which the court granted in part Plaintiff's post-trial motion for equitable relief, and Defendants' motion for judgment as a matter of law, or, in the alternative, for a new trial. The issues have been briefed and the motions are ripe for disposition.

I. Plaintiff's Motion to Reconsider and Amend

By order of September 24, 1996, the court directed Defendants to promote Plaintiff immediately to the rank of Park Operations Manager I and, as soon as one of the positions became available, transfer him to the park manager position at either French Creek or Gifford Pinchot State Park. As of the date on which Plaintiff file the instant motion, October 24, 1996, Defendants had not promoted Plaintiff to the rank of Park Operations Manager I. In his present motion, Plaintiff argues that the court erred in not directing that Defendants transfer him to the Eastern

Coordinator position because neither of the Park Operations Manager I positions are likely to become available anytime in the near future. Plaintiff has submitted a declaration in support of his motion in which he states that the Park Operations Manager I positions are the highest level park manager positions in the Commonwealth state park system. Plaintiff states that turnover is rare. The previous manager at the French Creek Park held that position for twenty-three years until his death. Plaintiff claims that the court's order that Defendants promote him to one of the Park Manager I positions as soon as one becomes available means, "in reality, [he] would have been but for the unconstitutional actions of defendants." (Fultz Decl. ¶ 5.) As a result, Plaintiff asks the court to reconsider its denial of his request to transfer him to the Eastern Training Coordinator position. In the alternative, Plaintiff requests an order from the court directing Defendants to promote him within sixty days. Plaintiff argues that such an order is necessary in order to prevent Defendants from avoiding the court's previous "open-ended" mandate to transfer him to one of the positions for which he would have been selected but for the unconstitutional actions of Defendants.

The court will not direct that Defendants transfer Plaintiff to the Eastern Training Coordinator position, because it will, instead, direct Defendants to promote Plaintiff to the rank of Park Operations Manager I and transfer him to either the park manager position at Gifford Pinchot State Park or French Creek State Park within sixty days of the date of this order. The court finds it necessary to impose a time limit within which Defendants must comply with the court's direction based on Defendants' present failure to take any action to promote Plaintiff to the rank of Park Operations Manager I and the probability that Defendants will use the court's open-ended direction to avoid

the court's previous mandate to transfer Plaintiff to either the French Creek or Gifford Pinchot State Park Manager I positions.

The court notes the likelihood that one of the individuals presently occupying the park operations manager positions will be displaced as a result of the court's direction that Plaintiff be promoted and transferred within sixty days. These individuals will suffer despite the absence of wrongdoing on their part. However, neither of these individuals have interests superior to Plaintiff's right to be placed in the position he would have been in but for the unconstitutional conduct of the Defendants. The fact that innocent third parties will be affected by the court's order does not mandate a different result. McLafferty v. Penn Hills Municipality, 1994 WL 722763 (W.D. Pa. 1994); McMullan v. Thornburgh, 508 F.Supp. 1044, 1054-55 (E.D. Pa. 1981). The court will not counsel Defendants on how to best effectuate the court's direction with the least harm to the affected individuals.

II. Defendants' Motion for Judgment as a Matter of Law or, in the Alternative, for a New Trial

Defendants have moved for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(b), or, in the alternative, for a new trial pursuant to Rule 59. Defendants argue that: (1) the jury was "mistakenly" permitted to decide a question of law and in so doing failed to apply the correct law; (2) the jury's verdict is predicated upon legally insufficient evidence and is, therefore, against the weight of the evidence; and (3) Plaintiff's receipt of a promotion and damages for the same injury amounts to double recovery. Prior to addressing each of the grounds asserted by Defendants in support of their motion, the court

must address Plaintiff's contention that Defendants' motion is untimely.

On September 24, 1996, pursuant to an order and memorandum of the court dated that same day, the Clerk of Court entered judgment on the jury verdict in this case. The court's September 24 order contained an error in that in both paragraphs four and five it directed the Clerk of Court to enter judgment in favor of Plaintiff and against Defendants in the amount of $10,000.00 for embarrassment, humiliation, and emotional harm. On September 27, 1996, the court sua sponte issued an order deleting paragraph five of both the court's September 24 order and the judgment. Federal Rule of Civil Procedure 50(b) states that a "movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment." Fed.R.Civ.P. 50(b). Rule 59(b) provides that a motion for a new trial shall be filed no later than ten days after entry of judgment. Plaintiff argues that in accordance with Rule 6(b), Defendants' motion was due on October 8, 1996. In response, Defendants argue that they filed their post-trial motion ten days from the date of the order amending judgment entered on September 27, 1996. Defendants argue that the court's September 27 order substantially altered the amount of damages awarded by the court on September 24, and resulted in a new judgment.

The court does not agree that the September 27 order was a new judgment which commenced anew Defendants' time period for filing post-trial motions. The Third Circuit has not explicitly addressed the issue of when an order by the court altering a prior judgment comprises a new judgment for purposes of calculating the time period for filing post-trial motions. The Third Circuit has addressed the issue as it relates to the timeliness of an appeal from judgment. "An

order substantively changing a judgment constitutes a new judgment with its own time for appeal at least where the change is the subject matter to be reviewed." Keith v. Truck Stops Corp. of America, 900 F.2d 743, 746 (3d Cir. 1990) (citing Charles v. Daly, 799 F.2d 343 (7th Cir. 1986)). "The test for whether a change is sufficient to begin anew the time for appeal 'is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality.'" Truck Stops, 900 F.2d at 746 (quoting F.T.C v. Minneapolis-Honeywell Regulator Co., 344 U.S. 206, 212 (1952)). In Truck Stops, the Third Circuit relied on Daly, cited by Defendants in support of their position that their post-trial motion is timely. In Daly the Seventh Circuit addressed the issue of the timeliness of a Rule 59 motion, holding that an alteration in judgment that "'changes matters of substance, or resolves a genuine ambiguity'" recommences all periods of time. 799 F.2d at 348 (quoting Minneapolis-Honeywell, 344 U.S. at 211). Accordingly, it is appropriate to rely upon the Third Circuit's discussion in Truck Stops to evaluate the timeliness of the instant motion.

The court finds that Defendants' motion is untimely. Defendants' argument that the court substantially altered the prior judgment because it reduced the amount of damages by $10,000.00 is without merit. The September 27 order did not change the substance of, resolve an ambiguity in, or change legal rights or obligations articulated in the previously entered judgment. The court merely directed the deletion of a duplicate paragraph contained in both the final order issued

on September 24 and corresponding judgment.[1] Ten days from the date of the court's September 24 order, excluding weekend days and holidays pursuant to Rule 6(b), was October 8. Defendants did not file their motion until October 10. Accordingly, the court will deny the motion as untimely. Pittsburgh Terminal Corp. v. Baltimore & Ohio R.R. Co., 824 F.2d 249, 252 (3d Cir. 1987) (Rule 59(e) timer limitation is jurisdictional requirement of which district court may not waive or grant extension); Cole v. Altieri, 435 F. Supp. 165, 168 (E.D. Pa. 1981) (untimely Rule 59(e) motion compels denial by district court).

Although the court will deny Defendants' motion as untimely, the court finds no merit in the substantive arguments proffered by Defendants in support of their motion. Defendants maintain that Plaintiff failed to produce "legally sufficient evidence of [his] entitlement to have his previous seniority restored which is necessary for a finding of retaliation and a verdict in his favor." (Defs.' Br. in Supp. at 8.) Defendants misunderstand the elements Plaintiff was required to prove in order to succeed on his First Amendment retaliation claim. Defendants are incorrect in

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[1]Both the court's September 24 order and the accompanying judgment each contained two paragraphs which read "Judgment in favor of Plaintiff and against the Defendants is granted in the amount of $10,00 for embarrassment, humiliation, and emotional harm." The court notes also that although it did not explicitly state so in its September 27 order, the court issued the order pursuant to Rule 60(a), not Rule 59 as suggested by Defendants. Rule 60 provides the court with the authority to correct "[c]lerical mistakes in judgments, orders or other parts of the record." Fed.R.Civ.P. 60(a).

their assertion that Plaintiff must demonstrate his legal right to seniority. As the Supreme Court stated in Perry v. Sinderman:

> For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests - especially, his interest in freedom of speech.

408 U.S. 593 (1972). In Perry, the Supreme Court held that Sinderman's "lack of contractual or tenure 'right' to re-employment for the 1969-70 academic year [was] immaterial to his free speech claims." Id. at 597-98. Thus, if a public employee alleges the denial of a governmental benefit, which includes seniority, in order to prevail on his First Amendment retaliation claims, he must prove simply that the decision to deny him that benefit was in retaliation for the exercise of his First Amendment right to free speech. Id. at 598. Perry's holding has been applied in a variety of contexts in which the decision whether to grant or deny a governmental benefit was discretionary on the part of the employer. Clark v. Yosemite Comm. College Dist., 785 F.2d 781, 789-90 (9th Cir. 1986) (school may not exercise discretion in making teacher assignment in retaliation for exercise of constitutional right to free speech); Robb v. City of Philadelphia, 733 F.2d 286, 295 (3d Cir. 1984) (transferring and denial of promotion constitute benefits which public employer may not deny in retaliation for exercise of First Amendment rights); Czurlanis v. Albanese, 721 F.2d 98, (3d Cir. 1983) (public employee had right not

to be suspended in retaliation for exercise of constitutional rights); see also Merriwether v. Coughlin, 879 F.2d 1037, 1045-46 (2d Cir. 1989) (although prison officials afforded broad discretion in transferring inmates, may not do so in retaliation for exercise of constitutional rights); Packish v. McMurtie, 697 F.2d 23 (1st Cir. 1983) (Selectmen with discretion to deny or grant request for indemnification could not refuse claim in retaliation for exercise of First Amendment rights).

The benefit to which Defendants claim Plaintiff did not demonstrate his entitlement was the restoration of seniority upon returning to work in June 1992. In reviewing a motion for judgment as a matter of law following trial, the court "view the evidence in the light most favorable to the non-moving party, and determine whether the record contains the minimum quantum of evidence from which a jury might reasonably afford relief." Truck Stops, 909 F.2d at 744-45 (internal quotations and citations omitted). The court finds that under the correct legal standard as explained by it in the preceding discussion, the record contains sufficient evidence from which the jury could conclude that the decision as to how to calculate Plaintiff's seniority was within Defendant Dunn's discretion. (See R. at 182a, 184a, 186a-87a, 189a, 204a, 209a-211a, 216a, 217a.)[2] Accordingly, had Defendants timely filed their motion for judgment as a matter of law, the court would deny the motion.

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[2]Defendants do not challenge the jury's finding that Plaintiff's prior protected activity was a substantial or motivating factor in Defendant Dunn's calculation of Plaintiff's seniority. This issue is not before the court and the court will not address it herein.

In the alternative, Defendants argue that should the court determine that the entry of judgment as a matter of law in favor of Defendants is not warranted, it should grant them a new trial because the jury's verdict is against the weight of the evidence. Defendants' position is premised on their misapprehension of the legal standards governing Plaintiff's claim of retaliation. (See Defs.' Br. in Supp. ("Insofar as the jury's verdict against the Defendants is predicated upon their finding that Fultz had a right to have his previous seniority restored, the verdict is against the weight of the evidence.").) Accordingly, had Defendants timely filed their motion, the court would deny the motion for a new trial based on the reasoning articulated in the preceding discussion.

Defendants also argue that the court should grant them a new trial on the issue of Plaintiff's loss of retirement benefits in light of the court's September 24 order directing Defendants promote Plaintiff to the rank of Park Operations Manager I. The jury awarded Plaintiff $120,000.00 in compensatory damages for past and future loss of retirement benefits. A new trial, Defendants maintain, is necessary in order to avoid Plaintiff receiving a double recovery for his injury.

The court acknowledged in its September 24 order that the portion of the jury's verdict which awarded Plaintiff compensatory damages "may require amendment in light of the equitable relief granted." The court finds that the parties, rather than a new jury, are the appropriate individuals to resolve the question of what portion of the jury's award appropriately compensates Plaintiff for his past loss of retirement benefits. This is not a case in which the jury awarded one lump sum which encompassed all of the compensatory damages to which it found Plaintiff entitled.

All that is required is for the parties to determine the amount of damages that compensates Plaintiff for his past loss of retirement benefits and the amount by which his benefits will increase as a result of his promotion. The court will direct the parties, upon Plaintiff's promotion to one of the Park Manager positions, to agree upon and submit a joint statement to the court regarding the amount by which the court should reduce the jury's award of compensatory damages for past and future loss of retirement benefits.

IV. Conclusion

For the reasons stated in the preceding discussion, the court will grant in part Plaintiff's motion to reconsider and amend paragraph eight of the court's order of September 24, 1996. The court will deny Defendants' motion for judgment as a matter of law, or in the alternative, for a new trial.

An appropriate order will issue.

/s/

SYLVIA H. RAMBO, Chief Judge
Middle District of Pennsylvania

Dated: January 16, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

KENNETH W. FULTZ,	:	CIVIL ACTION
	:	NO. 1:94-CV-1914
v.	:	
	:	
JOHN S. DUNN, JR.,	:	
DENNIS L. FARLEY, and	:	
JAMES M. SEIF,	:	
	:	
Defendants	:	

ORDER

In accordance with the accompanying memorandum of law, **IT IS HEREBY ORDERED THAT:**

(1) Plaintiff's motion to reconsider and amend the court's order of September 24, 1996 is **GRANTED** in that Defendants are directed to promote Plaintiff to the rank of Park Operations Manager I and transfer him to either the park manager position at Gifford Pinchot State Park or French Creek State Park within sixty days of the date of this order.

(2) Defendants' motion for judgment as a matter of law, or, in the alternative, for a new trial is **DENIED**.

(3) Within ten days of the date upon which Defendants promote Plaintiff to the rank of Park Operations Manager I and transfer him to the park manager position at either French Creek or Gifford Pinchot State Park, the parties are directed to agree upon and submit a joint statement to the court regarding the amount by which the

court should reduce the jury's award of compensatory damages for past and future loss of retirement benefits.

(4) The stay of briefing on Plaintiff's motion for attorney's fees is **VACATED**:

(a) Defendants shall file a response to Plaintiff's motion within twenty (20) days of the date of this order.

(b) If he so desires, Plaintiff shall file a reply brief within ten (10) days after service of Defendants' responsive brief.

(5) The stay of enforcement of the judgment entered by the court on November 12, 1996 is **VACATED** in all respects except with regard to the portion of the judgment awarding Plaintiff compensatory damages for past and future loss of retirement benefits.

/s/

SYLVIA H. RAMBO, Chief Judge
Middle District of Pennsylvania

Dated: January 16, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

KENNETH W. FULTZ,	: Civil Action
	: No. 1:94-CV-1914
Plaintiff,	:
	:
v.	:
	:
JOHN S. DUNN, JR.,	:
DENNIS L. FARLEY,	:
	:
Defendants.	:

SPECIAL VERDICT QUESTIONS

QUESTION NO. 1

Do you find that Plaintiff's exercise of his First Amendment rights was a substantial or motivating factor in Defendant Dunn's calculation of his seniority?

_X_ YES ___ NO

If you answered NO to Question No. 1, please sign the verdict form now and return to the courtroom.

If you answered YES to Question No. 1, please proceed to the second part of this question below.

Do you find that even though Plaintiff's exercise of his First Amendment Activity was a substantial or motivating factor in Defendant Dunn's calculation of his seniority, that the same action would have been taken in the absence of the protected activity?

_X_ YES ___ NO

If you answered NO to the preceding question, please proceed to Question No. 2. If you answered YES to the preceding question, please sign the verdict form now and return to the courtroom.

QUESTION NO. 2

Do you find that Defendant Farley knew about and acquiesced in Defendant Dunn's retaliatory conduct?

_X_ YES ___ NO

QUESTION NO. 3

Indicate the amount of nominal damages you award plaintiff as a result of either Defendant Dunn's or Defendant Dunn's and Defendant Farley's retaliatory conduct in calculating his seniority?

$ 1.00

Please proceed to Question No. 4.

QUESTION NO. 4

Do you find that but for Defendant Dunn's calculation of Plaintiff's seniority, Plaintiff would have been selected for one of the Park Manager positions for which he applied?

_X_ YES ___ NO

QUESTION NO. 5

Indicate the amount of compensatory damages, if any, Plaintiff is entitled to receive.

Past Loss of Earnings - $15,000.00

Future Loss of Earnings - $15,000.00

Past and Future Loss of Retirement Benefits $120,000

Reimbursement for Room, Board and Travel Expenses, and Loss of Value State Residence - $15,000.00

Embarrassment, Humiliation, and Emotional Harm - $10,000.00

QUESTION NO. 6

Indicate the amount of punitive damages you award plaintiff as a result of either Defendant Dunn's or Defendant Dunn's and Defendant Farley's retaliatory conduct in calculating his seniority.

Dunn $ 20,000.00

Farley $ 20,000.00

/s/

JURY FOREPERSON

Date: August 9, 1996

Not for Publication

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 90-6039 & 91-5058

KENNETH W. FULTZ

Appellant

v.

ARTHUR A. DAVIS; GREGG E. ROBERTSON;
WILLIAM C. FORREY; DEPARTMENT OF
ENVIRONMENTAL RESOURCES,
An Executive Department of the
Commonwealth of Pennsylvania

Argued: May 15, 1991

BEFORE: HUTCHINSON, COWEN and GARTH,
Circuit Judges

(Filed JUL 15 1991)

OPINION OF THE COURT

COWEN, Circuit Judge.

Kenneth W. Fultz brought suit against the Pennsylvania Department of Environmental Resources ("DER") and the individual defendants under 42 U.S.C. § 1983, alleging that he was denied procedural due process in connection with his dismissal after 24 years of employment with the Commonwealth of Pennsylvania. Fultz claims that he was entitled to but denied a pre-termination hearing with respect to the charges for which he was dismissed. The district court granted summary judgment for the DER and the individual defendants on the ground that Fultz received all of the pre-termination process to which he was entitled by law. We have jurisdiction under 28 U.S.C. § 1291.[1] Because we

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[1]The district court granted the DER's motion for summary judgment on November 30, 1990. One week before, on November 23, 1990, the district court granted the DER's motion for a protective order quashing the notice of deposition of the Secretary of the DER, Arthur Davis. On December 3, 1990, Fultz filed a motion for reconsideration of the notice-quashing order of November 23rd. On December 12, 1990, Fultz filed this appeal, docketed at 90-6039, to appeal both the district court's November 30th order granting summary judgment and the November 23rd order quashing Secretary Davis' notice of deposition. On January 10, 1991, the district court denied Fultz' motion for reconsideration on the ground that summary judgment had been properly granted. The court did not reconsider its order to quash Secretary Davis' notice of deposition, which was the only order Fultz had requested the court to reconsider.

Under Fed. R. App. P. 4(a)(4), certain motions under Fed. R. Civ. P. 59(e) to reconsider a district court's judgment suspend the time for filing a notice of appeal. As a result, a party that files a Rule 59(e) motion after

find the Fultz did not receive the pre-termination process to which he was constitutionally entitled, we will reverse.

I.

Fultz was employed for many years by the DER as Superintendent 4 at the Tobyhanna, Gouldsboro and Big Pocono State Parks, in Monroe County, Pennsylvania. Because Fultz' job required him to be on-call 24 hours a day, Fultz and his family lived in a Commonwealth-owned residence, located on the grounds of Tobyhanna, which they rented from the Commonwealth. Under the occupancy agreement between Fultz and the Commonwealth, he was expressly precluded from conducting business on the premises. Fultz also agreed to observe all rules and regulations of authorities having jurisdiction over the premises. Notwithstanding these restrictions, Fultz ran a small business in his spare time which consisted of removing privately-owned boats for Tobyhanna park patrons for $25 a

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filing its notice of appeal must file a new notice of appeal after the district court disposes of the Rule 59(e) motion. In this case, Fultz filed a motion to reconsider the order quashing the notice of deposition, which is not one of the motions covered by Rule 4(a)(4). Fultz did not file a Rule 59(e) motion to reconsider the grant of summary judgment, a motion which would have been covered by Rule 4(a)(4). The fact that the district court mistakenly interpreted Fultz's motion to reconsider the order quashing Davis' deposition should not affect the appealability of the original summary judgment order. Fultz's appeal at 90-6039 was therefore timely. We will dismiss Fultz's appeal at 91-5058 as it was untimely. Because the appeal at 90-6039 is timely, we have jurisdiction under 28 U.S.C. § 1291.

season and storing them around his residence.

In April, 1987, the governor of Pennsylvania issued an executive order authorizing the creation of an Inspector General's Office to deal with fraud, waste and abuse within agencies under the governor's jurisdiction. James E. Johnson was appointed Deputy Inspector General for the DER in November, 1987. After he was appointed, but before he assumed the responsibilities of his new post, Johnson received a tip from an audit intern in the comptroller's office that Tobyhanna park patrons were checking in their boats for winter storage at the park, but that the boat storage area was empty. The intern reported that when he questioned the Tobyhanna Superintendent, Ken Fultz, he was told that the boat storage had nothing to do with park business. Knowing that Johnson would soon be in a position to investigate, the intern related the suspicious encounter to Johnson.

As soon as Johnson became Deputy Inspector General, he assigned Frank Bunting, a former United States marshal and criminal detective, to investigate the intern's tip. Bunting had been hired two weeks before to serve as an investigator in the Inspector General's Office assigned to the DER.

On February 29, 1998, Bunting visited Tobyhanna unannounced and interviewed various park employees, including Fultz. Fultz immediately acknowledged that he had been removing and storing privately-owned boats for several years. Although Fultz admitted to Bunting that he was storing boats, he refused to acknowledge that he was doing anything wrong. Instead, Fultz sought to justify his conduct by explaining that the state-provided facilities for storing boats were inadequate. Fultz also told Bunting that he removed the boats on his own time with his own vehicles and

stored the boats on property he leased from the Commonwealth. Fultz then gave Bunting a list of his customers and provided him with a copy of a letter that he had sent to his customers.

After Bunting left Tobyhanna, Fultz contacted his immediate supervisor, Gerald Robinson, the regional park superintendent. Fultz arranged to meet Robinson the next day at Robinson's office in Nockamixon State Park. At the meeting, Fultz told Robinson that an investigator from the Inspector General's Office had come to Tobyhanna the previous day to conduct an investigation about allegations that boats were being stored at Tobyhanna, but not in the park's winter storage program. Fultz admitted that he had been storing boats for park patrons for $25 a season and explained why he thought he had not done anything wrong. Robinson indicated that Fultz was in trouble and suggested that he cooperate with the investigation.

On March 21, 1988, armed with Bunting's report, Fultz' admission that he had been storing boats along with corroboration from Robinson and Tobyhanna employees, Johnson met with Bill Forrey, the Director of the Bureau of State Parks, and John S. Dunn, Chief of Division of Employee Relations and Safety of the DER to discuss what action should be taken against Fultz. Johnson presented Forrey and Dunn with a draft report of conclusions and recommendations prepared by the Office of the Inspector General. After consulting briefly with Robinson in a telephone conference call, Forrey made the decision to suspend Fultz pending the conclusion of the investigation. Gregg Robertson, the Deputy Secretary for Administration of the DER, approved the decision and signed a letter dated March 21st suspending Fultz. Although Robinson was consulted, he played no role in the decision to terminate

Fultz. After the meeting, Robinson was directed to inform Fultz that he had been suspended pending recommendation for dismissal after a complete investigation. On March 22, 1988, Robinson traveled to Tobyhanna and delivered the news to Fultz along with the letter from Robertson.

The investigation into the conduct of Fultz continued after his suspension on March 22nd. As a result of that investigation, the Inspector General's Office discovered that Fultz was storing a gun in his desk at work and that he had submitted a bill for $18 to repair a calculator that he owned. Both discoveries led to additional charges against Fultz because the DER had a policy against carrying firearms while on duty and against using the Commonwealth advance account for personal expenditures. On April 20, 1988, Fultz was officially terminated from his position with the DER. The letter terminating Fultz specified that he had been discharged based on all three charges.

On June 6, 1988, the State Civil Service Commission conducted a hearing to determine if Fultz had been terminated for just cause. In an opinion issued November 25, 1988, the Commission found that there was just cause to dismiss Fultz based on the three charges leveled against him. On October 18, 1989, the Commonwealth Court of Pennsylvania affirmed the Commission's conclusion that there was substantial evidence to support the Commission's finding that just cause existed to terminate Fultz based on his boat storage business. But, the Court found there was insufficient evidence to support the Commission's finding of just cause to dismiss Fultz based on storing the firearm in his desk and submitting the calculator repair bill.

On April 19, 1990, Fultz filed this civil rights action pro se in the United States District Court for the Middle

District of Pennsylvania under 42 U.S.C. § 1983. He alleges that his termination was accomplished in violation of his Fourteenth Amendment right to procedural due process because he had a property interest in his position with the DER under Pennsylvania's Civil Service Act and he was terminated without a pre-termination hearing. The district court granted defendants' motion for summary judgment because it concluded that Fultz received all the pre-termination process to which he was constitutionally entitled.

II.

The crux of Fultz' complaint is that he did not receive the pre-termination process to which he was constitutionally entitled. Under Cleveland Bd. of Educ. v. Loudermill, 105 S. Ct. 1487 (1985), individuals employed by a state who have a property interest in their jobs must be afforded "some kind of a hearing" prior to discharge. It is undisputed in this case that under Pennsylvania's Civil Service Act, Fultz has a property interest in his job. We must determine then whether Fultz received a constitutionally sufficient hearing before he was dismissed.

Loudermill teaches that a pre-termination hearing will satisfy that requirements of due process as long as it serves as "an initial check against mistaken decisions." Id. at 1495. The pre-termination hearing must be adequate to determine "whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." Id. The Court warned, however, that "[e]ven where the facts are clear, the appropriateness or necessity of the discharge may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decision-maker is likely to be before the termination takes effect." Id. at 1494.

Although the pre-termination hearing must be adequate to serve as a check against mistaken decisions, it need not be elaborate and can be something short of a full evidentiary hearing. The formality required depends on the importance of the property interest and the nature of subsequent proceedings. Id. at 1495. Our review of the record in this case convinces us that Fultz was denied the pre-termination hearing to which he was constitutionally entitled, and that this denial was compounded by the limited scope of the post-termination Civil Service Commission hearing.

Fultz was ultimately dismissed based on charges that he committed three offenses. First, that he stored boats on Commonwealth property and kept the money for himself. Second, that he maintained a firearm while on duty. Third, that he fraudulently submitted a repair bill for a calculator not owned by the Commonwealth. The Commonwealth contends that Fultz received a Loudermill hearing on the boat storage charge, but concedes that he did not receive pre-termination hearings on the firearm and calculator charges. Even if we agreed that Fultz received a Loudermill hearing on the boat storage charge (which we do not), we would reverse the district court because Fultz was entitled to a hearing on every charge that formed the basis for his dismissal. By denying Fultz a hearing on all three charges, the state denied Fultz the opportunity to explain his side of the story -- an opportunity that might have persuaded the decision-maker that discipline short of discharge was warranted.

Moreover, we do not agree that Fultz received a Loudermill hearing on the boat storage charge. Fultz' pre-termination "hearing" was limited to an investigation of the charge that Fultz was improperly storing boats on

Commonwealth property. That investigation was conducted by Bunting, a two-week veteran of the newly-created investigative arm of the DER. Bunting was not empowered to make a decision concerning Fultz' employment status and was sent to Tobyhanna to investigate. Bunting in no way participated in the decisions to suspend and then terminate Fultz. Since Loudermill requires a pre-termination hearing capable of invoking the decision-maker's discretion, and Bunting was not even a decision-maker, we must conclude that Fultz' pre-termination contact with Bunting was not a Loudermill hearing.

We can find only one other encounter that could constitute a pre-termination hearing. That is Fultz' conversation with his supervisor Robinson on March 1, 1988. On that day, Fultz traveled to Nockamixon State Park to meet with Robinson to discuss the investigation that had sent Bunting to Tobyhanna the day before. Once again, we must conclude that this encounter was not a Loudermill hearing. First, Robinson played no role in the decisions to suspend or terminate Fultz. Those decisions were made by Johnson, Forrey, and Dunn in conjunction with the Office of the Inspector General at a meeting on March 21st, with final approval coming from Robertson. Robinson was not present at that meeting and participated only tangentially by telephone. Second, Fultz' March 1st meeting was initiated by Fultz. Under the circumstances, that encounter could not serve as an initial check against mistaken decisions because Robinson was not even aware at the time that Fultz was being investigated for anything. The DER has also suggested that Robinson's meeting with Fultz on March 22, 1988 was the Loudermill hearing. We can reject that contention out of hand because Forrey had already made the decision to suspend\terminate Fultz the night before at his meeting with Johnson and Dunn.

Even if Fultz had received a Loudermill hearing on all three charges, however, we would nevertheless be compelled to reverse the district court's grant of summary judgment because the post-termination proceedings available to Fultz were severely limited in scope and two of the three charges for which Fultz was discharged were found on appeal to the Commonwealth court not to constitute just cause for dismissal. Because a Loudermill hearing must be more or less elaborate in inverse proportion to the adequacy of post-termination proceedings, and the post-termination proceedings in this case were limited to a determination whether Fultz' offense was legally sufficient to permit a discretionary decision to discharge, not whether discharge was the appropriate punishment in Fultz' case, Loudermill requires that the pre-termination procedure afforded Fultz be relatively more elaborate. Fultz was therefore entitled to a pre-termination procedure which was capable of reaching a supported factual conclusion that he should be discharged. In this case, even if we accepted the DER's arguments that the pre-termination contacts Fultz had with DER officials were Loudermill hearings (and we ignored the fact that even then Fultz received a hearing on only one of the charges), we would nevertheless conclude that Fultz was denied procedural due process because the pre-termination hearings he was afforded were inadequate in light of the limited post-termination proceedings available. We do not mean to imply, however, that the most elaborate Loudermill hearing would be rendered inadequate just because post-termination proceedings reached a different factual conclusion as to what facts provided just cause for termination. But, given Pennsylvania's scheme of post-termination adjudication, a Loudermill hearing in Pennsylvania must provide sufficient procedural safeguards to reach an informed outcome. While such safeguards could not guarantee the appropriate outcome in every case, Loudermill would have been satisfied. In this

case, because the post-termination proceedings were too limited in scope in light of the informality of the pre-termination proceedings, we must conclude that Fultz was denied procedural due process. Only an elaborate post-termination proceeding could have compensated for the deficiency of the original Loudermill hearing.

We will therefore not only reverse the order granting defendants' motion for summary judgment, but we will also direct that the district court enter an order granting summary judgment for Fultz on the issue of liability for a violation of Fultz' civil rights. Because Fultz' rights were violated, we will direct that the district court order the individual defendants to cause Fultz to be reinstated to his position as park superintendent.[2] We will leave it to the district court to resolve the outstanding issues concerning attorneys fees and other damages. Finally, although we will order that the district court grant summary judgment for Fultz, nothing in our opinion or judgment should be construed to prevent the DER from re-charging Fultz once he has been reinstated. See, e.g., Richardson v. Felix, 856 F.2d 505, 511 (3d Cir. 1988). We hold only that Fultz' constitutional rights were violated when he was terminated without a prior hearing.

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[2]While we agree with the DER that the Eleventh Amendment prevents us from ordering the Commonwealth or the DER to reinstate Fultz, see Pennhurst v. Halderman, 465 U.S. 89, 100-101 (1984), we do have the power to order the individual defendants to cause Fultz to be reinstated. See Ex Parte Young, 209 U.S. 123 (1908).

III.

In addition to challenging the district court's entry of summary judgment for the DER and the individual defendants, Fultz also appeals the district court's order quashing the notice of deposition for defendant Arthur Davis, the Secretary of the DER. We review discovery orders for abuse of discretion. See Marroquin-Manriquez v. I.N.S., 699 F.2d 129, 134 (3d Cir. 1983), cert. denied, 467 U.S. 1259 (1984). Fultz contends that he should have been permitted to depose Davis because Davis participated in his termination, as evidenced by the fact that Fultz' termination letter had Davis' name on it. Because Fultz might be able to show that Davis personally participated in the decision to terminate him, Fultz claims that the district court abused its discretion in quashing the notice of Davis' deposition. We disagree.

It is well established that high government officials should not be compelled to testify unless the party seeking such testimony establishes that the testimony he seeks to elicit is necessary, relevant, and cannot be gathered from another source or by another means. See Kyle Engineering Co. v. Kleppe, 600 F.2d 226, 231-32 (9th Cir. 1979). Fultz has not met that burden because he has not shown that the testimony is necessary, relevant or unavailable from another source.

Secretary Davis filed an affidavit with the district court in which he swore under oath that he had no personal involvement in and has no personal knowledge of any matter relating to Fultz' termination. Secretary Davis made similar statements in his sworn responses to Fultz' interrogatories. In view of the fact that Fultz has offered no basis for believing that Davis had anything to do with the decision to

terminate him, other than the form termination letter that included Davis' name, we cannot conclude that the district court abused its discretion in quashing the notice of Davis' deposition. We will therefore affirm the district court on that issue.

IV.

Because we find that Fultz did not receive the pre-termination hearing to which he was entitled, we will reverse the order of the district court granting summary judgment to defendants. In addition, we will direct the district court to enter an order granting summary judgment for Fultz on the issue of liability. We will also direct the district court to order the individual defendants to cause Fultz to be reinstated to his position as park superintendent. Our determination is without prejudice to the right of the DER to refile charges against Fultz and provide him with a constitutionally adequate Loudermill hearing. Finally, we will affirm the district court's November 23, 1990 order to quash the notice of Secretary Davis' deposition. Appeal No. 91-5058 will be dismissed. Costs in Appeal No. 90-6039 taxed to Appellees. Costs in Appeal No. 91-5058 taxed to Appellant. The district court decision is affirmed in all other respects.

TO THE CLERK OF THE COURT:

Please file the foregoing opinion.

/s/ Robert E. Cowen
Circuit Judge

Certificate of Service

Counsel for petitioner, Michael S. Fettner, Esquire, hereby certifies that three copies of the foregoing petition were served upon counsel for respondents, via first-class mail, on May 10, 1999.

Served upon:

Gwendolyn T. Mosley, Esquire
Senior Deputy Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120